U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date:08/23/99
Case No.: **1999 INA 165**

In the Matter of:

GOLDEN AGE ANTIQUES, INC., Employer,

on behalf of

ISAAC BACA, Alien,

Certifying Officer: Hon. John Castellani, Region II
Appearance: Mario DeMarco, Esq., of Farmingdale, New York, for Employer and Alien.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that GOLDEN AGE ANTIQUES ("Employer") filed on behalf of ISAAC BACA ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York,, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.[2]

STATEMENT OF THE CASE

On June 23, 1995, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Antiquer Furniture Refinisher" in its antique furniture business. Employer's application described the Job Duties as follows:

> Finishes or refinishes worn or used furniture to specified color utilizing knowledge of wood properties, finishes, and furniture styling. Removes old finish from furniture. Smooth surface. Selects finish ingredients and mixes them. Brush or spray stain, shellac, laquer, or paint. Grain wood or paint wood trim. Polish and wax finished surface. .

AF 39, box 13. (Copied verbatim without change or correction.) Based on the Employer's description of the duties of the Job to be Performed, the position was classified as a Furniture Finisher under DOT Occupational Code No. 763.381-010. The Employer stated no education or training qualification, but required two years of experience in the Job Offered or four years of experience as a Furniture Maker. *Id.*, box 14. This was a forty hour a week job from 09:00 AM to 05:00 PM, with no provision for overtime at an hourly rate of $18.88. *Id.*, boxes 10 -12. Although seven apparently qualified U. S. workers applied for this job, all of them were rejected.AF 52-74.

Notice of Findings. On June 16, 1998, the Certifying Officer ("CO") issued a Notice of Findings ("NOF") proposing to deny certification. AF-75-77. After citing 20 CFR §§ 656.20(c)(8), 656.21(b)(6), and 656.21(j), the CO found US applicants, Cosorean, Forbes, Godoy, Mohamed, Torres, Jr., and Mullings qualified for the job. First, the CO rejected the Employer's written report, explaining that it did not constitute evidence because it was signed and filed by the Employer's attorney, and was neither acknowledged nor signed by Employer. Employer was directed to file a report of recruitment results stating any lawful, job-related reasons that supported its rejection of the U. S. workers who applied for the position. (1) If an application was rejected based on an interview, the Employer must document the lawful job-related reasons for rejection; (2) if the applicant was rejected based on her/his resume, specify why the applicant was rejected without an interview; and (3) in all other instances, the Employer was directed to explain why it failed either to interview or to review the resumes of the U.S. applicants it rejected.

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[2]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

Rebuttal. The Employer submitted its rebuttal on July 10, 1998. The rebuttal consisted of a letter and file items that it attached. Employer said applicants Cosorean and Forbes did not have experience with antiques, Gordoy had no knowledge of a certain polish, Welsh, Mohamed and Torres did not call or show up for an interview and Mullings came for an interview failed to return within two weeks the antique that he took home after the interview. AF 105-106.

Second Notice of Findings and Rebuttal.. On September 24, August 4, 1998, the CO found that Employer duly documented lawful job-related reasons for rejecting the applicants Welsh, Mohamed, Torres and Mullings in a Second Notice of Findings. The CO found that the Employer had not adequately demonstrated that Cosorean, Forbes and Godoy were rejected for job-related reasons, however. (1) Employer stated applicants Cosorean and Forbes were rejected on review of their resumes because they had no experience working on antiques, but the CO noted their resumes established experience working on antiques. (2) The Employer stated Godoy was rejected because he had no knowledge of a certain polish while his resume showed he had the experience required. The CO said that this applicant had more than ten years of experience in cabinet making and finishing, that he appeared to be qualified for the job, and that the Employer's reference to his alleged lack of knowledge concerning a certain polish is not sufficiently specific to support a finding that it was a lawful job-related reason for rejecting him.

The Employer's Second Rebuttal reiterated that Cosorean and Forbes lacked the experience working in antiques and that they were not qualified for the job for that reason. Employer did not address the CO's statement that their resumes indicated they had experience working in antiques, but rather Employer reiterated his statement that experience working on antiques was critical for this job opportunity. Employer then said that Godoy was vague and uncertain in response to questions he was asked during the interview. Employer concluded that he was not qualified for the job opportunity for this reason. AF 110-111.

Final Determination. On September 24, 1998, the CO's Final Determination found that Employer's statement that these two US applicants were not qualified for the job was not supported by the evidence of record. The CO again said Cosorean and Forbes both demonstrated more than two years of experience as Furniture Finishers, and that their experience had included work on antiques. The CO also questioned Employer's rejection of Godoy in light of his background in furniture restoration and finishing, which also included experience on antiques:

> Employer's reference to 'various polishes and stain' is vague & it is not clear whether this relates to the issue of 'french' polishing which the Notice pointed out could not be considered a lawful job-related basis for rejection of applicants. As an aside, we note employer emphasizes that 'I require the services of an ANTIQUE furniture finisher-antique being the operative word.' However, while the alien appears to meet the employer's related experience requirements of four years as Furniture Maker, neither the ETA-750B form nor the alien's letter of experience from his previous employer reflects that the alien's experience included working with antiques.

Finding that the Employer failed to establish lawful job-related reasons for rejecting these qualified US applicants, the CO denied certification. AF 112.

Appeal. On October 18, 1998, Employer requested administrative judicial review by BALCA. The Employer argued that, even though its description of the Job to be Performed did not mention antiques, it "specifically lists finishing and refinishing of worn and used furniture," saying, "This specifically relates to work done on antiques, as it specified worn and used furniture." The Employer then restated its reasons for having rejected the U. S. workers Cosorean, Forbes, Godoy, and Mullings. AF 124-125.

DISCUSSION

Noting Employer's requirement of two years of experience in the Job Offered, the Panel observes that the resumes of these three US applicants indicates that all of them had experience in the job offered, and that they had specific experience in performing such work on antiques. Cosorean's resume noted experience from December 1994 through December 1996 as a furniture finisher at Cherry Custom Made Cabinets, and his resume said he had "Repaired and removed old finish from the used furniture and antiques, then repainted the same color or any other color." AF 102. Forbes' resume noted experience in furniture refinishing from 1989 through 1993 "finishing of furniture, antiques..." AF 99. Godoy's resume noted jobs in the restoration of furniture and antiques from January, 1976 through 1996, asserting "long experience in repair and restoration of modern and antique furniture" , Based on a review of their resumes, the CO correctly noted that applicants Cosorean, Forbes, and Godoy were qualified. On the other hand, the Alien's Statement of Qualifications made no mention of any experience in refinishing antiques whatsoever. Moreover, the Alien's proof of his experience indicated his experience consisted of manufacturing new furniture by using modern materials such as Melamine, which clearly was inconsistent with the refinishing of antiques. AF 115-117. Consequently, the CO correctly inferred that the Alien did not meet the hiring criteria that the Employer required of the U.S. workers who applied for this job.

It is well-established that the Employer must establish that the Alien possesses the stated minimum requirement for the position. **Charley Brown's**, 90 INA 345 (Sep. 17, 1991). Under 20 CFR 656.21(b)(6) certification is properly denied where the alien does not meet the employer's stated job requirements. **Marston & Marston, Inc.**, 90 INA 373 (Jan. 7, 1992). Second, the Employer may not require of U. S. workers better qualifications and training than the Alien offers. **Western Overseas Trade and Development Corp**., 87 INA 640 (Jan. 27, 1988). 20 CFR § 656.21(b)(5) required Employer to prove that the Job Requirements in its Application represented its actual minimum requirements for this position, that Employer had not hired workers with less education, training or experience for jobs similar to the position offered in the Application, or that it was not feasible to hire U. S. workers with less education, training or experience than the employer's job offer required.

Consequently, the Panel considered the Employer's use of its alternative experience

requirements, based on the Board's holdings in **Francis Kellogg, et als.**, 94 INA 465, 94 INA 544, 95 INA 068 (Feb. 2, 1998)(*en banc*). First, the Board held in **Kellogg** that any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the DOT. 20 CFR § 656.21(b)(2). Although there are legitimate alternative job requirements, which can and should be permitted in the labor certification process, such alternatives must be substantially equivalent to eachother with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative requirement is substantially equivalent to that primary requirement in that an applicant can perform the job duties in a reasonable manner, such an alternative requirement will be considered as normal when the record is considered under 20 CFR § 656.21(b)(2). Second, we held in **Kellogg** that where the alien does not meet the primary job requirements, but is only potentially qualified for the job because the employer has chosen to list alternative job requirements, employer's alternative requirements are regarded as unlawfully tailored to the alien's qualifications in violation of 20 CFR § 656.21(b)(2), unless the employer has indicated that applicants with any suitable combination of education, training, or experience are acceptable. **Kellogg**, *supra.*

Based on these holdings, the Panel has found that the evidence of record supports the CO's construction of the resumes of applicants Cosorean, Forbes and Godoy. First, 20 CFR § 656.20(c)(8) requires the Employer to establish that the position offered has been and is clearly open to any qualified U. S. worker. 20 CFR §§ 656.21(b)(6) and 656.21(j)(1) further provide that where U.S. workers have applied for the job, the employer must document that they were rejected solely for reasons that were lawful and job-related. An employer has failed to specify a lawful job-related reason for rejecting the U.S. applicant when it fails to explain the applicant's lack of qualifications or prove that he is qualified with persuasive documentation. **Seaboard Farms of Athens, Inc.**, 90 INA 383 (Dec. 3, 1991); **Tulasi Polavarapu, M.D.**, 90 INA 333 (Oct. 29, 1991); **D & J Finishing, Inc.**, 90 INA 446 (Aug. 13, 1991); **Poquito Mas**, 88 INA 486 (Feb. 26, 1990). An applicant usually will be considered qualified for a job if he meets the minimum requirements specified for the job in the labor certification application. **United Parcel Service**, 90 INA 090 (Mar. 28, 1991); **Mancillas International Ltd.**, 88 INA 321 (Feb. 7, 1990); **Microbilt Corp.**, 87 INA 635 (Jan. 12, 1988). An employer's rejection was held to be unlawful where the U.S. worker satisfied the minimum requirements specified on the ETA 750A and in the advertisement for the position. **American Cafe**, 90 INA 026 (Jan. 24, 1991); **Cal-Tex Management Services**, 88 INA 492 (Sept. 19, 1990); **Richco Management**, 88 INA 509 (Nov. 21, 1989).

The evidence in this case clearly establishes that applicants Cosorean and Forbes did meet the minimum requirements specified for the job. Since Employer rejected them because they failed to meet the hiring requirements of the job opportunity, Employer failed to prove that its reasons for rejecting Cosorean and Forbes were lawful and job-related. Moreover, the Employer failed to submit the documentation it was directed to file in the NOF, but merely reiterated its unsupported allegations that these applicants were not qualified, which were

contradicted by their resumes. As the Employer's response to the first and second NOF failed to sustain the burden of proof, the CO's denial of certification was supported by the evidence of record.

ORDER

The denial of alien labor certification by Certifying Officer is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.